No. 17-8937

IN THE SUPREME COURT

OF THE UNITED STATES

CASH JEROME FERGUSON-CASSIDY,

PETITIONER

vs.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; and JACOB MAYNARD, Police Officer II, LAPD Serial No. 34820, in his official capacity and in his individual capacity,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

"BRANDEIS" PETITION FOR REHEARING FOLLOWING DENIAL OF PETITION FOR A WRIT OF CERTIORARI

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LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page. They are re-listed below.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

PLAINTIFF:

CASH JEROME FERGUSON-CASSIDY.

DEFENDANTS:

CITY OF LOS ANGELES;
LOS ANGELES POLICE DEPARTMENT; and
JACOB MAYNARD, Police Officer II, LAPD Serial No. 34820, in his official capacity and in his individual capacity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

Supreme Court Cases Conflicting With or Pertinent to: (Respectively) the District Court and Ninth Circuit's Substantive Rulings in: *Ferguson-Cassidy v. City of Los Angeles, et al.*

Other Federal Cases

U.S. CONSTITUTION

FEDERAL STATUTES AND RULES

Federal Statutes

Federal Rules of Civil Procedure

Federal Rules of Evidence ("FRE")

OTHER

Law Review and Journal Articles

Journalistic Accounts

Official Findings and Reports

Miscellaneous Items

/

/

Appendices

Monographs

Song Lyric

Maxims and Adages

INDEX TO- AND TABLES OF CONTENTS OF APPENDICES
(Found following rehearing petition)

APPENDIX A
Conservative Pundit David French's Article in National Review

"End Qualified Immunity" 9/13/2018
https://www.nationalreview.com/2018/09/end-qualified-immunity-supreme-court/

APPENDIX B
Conservative Pundit David French's Article in National Review

"It's Time to Deal with the Police Threat to the Second Amendment" 7/30/2017
https://www.nationalreview.com/2017/07/police-threaten-second-amendment-raid-wrong-home-shoot-innocent-man/

APPENDIX C
Conservative Pundit David French's Article in National Review

"Shouldn't Police at Home Exhibit at Least as Much Discipline as Soldiers at War?" 4/4/2018
https://www.nationalreview.com/2018/04/stephon-clark-shooting-police-should-show-more-discipline-restraint/

Background. On 4/16/2018 Petitioner filed the certiorari petition in Cash Jerome Ferguson-Cassidy, Petitioner vs. City of Los Angeles; Los Angeles Police Department; and Jacob Maynard, Police Officer II, LAPD Serial No. 34820, a LAPD rifle-shooting case that raised highly socially important legal issues arising out of the facts set forth in the certiorari petition at pages 3-15. The case involves a special category of (increasingly common) situations in our gun-saturated society, where police respond to residences where persons of interest who have reportedly engaged in minor disturbances of the peace are holding a firearm, and police employ deadly force without making any pre-announcement of their presence or issuing any warning.

It being understood that the Supreme Court takes cases not to correct errors but to set or revise legal ground-rules for broad application where circuits have conflicted with one another and/or issues of national moment are raised, and it being further understood that Plaintiff has not YET persuaded four members of this honorable Court that his case is of sufficient urgency and moment to warrant its intervention, Plaintiff implores the honorable court to reconsider its strong tentative decision to leave Plaintiff "twisting in the wind" (in the old Watergate phrase).

As all the members of this high Court (with the possible exception of Justice Kavanaugh who didn't participate in the 10/1/2018 Supreme Court conference deliberation) know by now, this case is a classic exemplar of a very broad category of cases where police are called to- or unbidden (but on police business) transport themselves to the scenes of residences or temporary lodging (motels or hotels) where persons of interest are armed with a firearm. As just noted, this situation is highly common in America given the ubiquity of gun ownership and possession here compared to other Western countries (particularly those of Canada, Great Britain, Australia and

western Europe) and usually legal under our (unique) Second Amendment.[1/]

In his Ninth Circuit briefs and again in Plaintiff's certiorari petition proper which summarizes crucial facets of Plaintiff's written and oral arguments to the Ninth Circuit panel, Plaintiff's undersigned counsel informed the panel below and this high Court of the undisputed seminal facts of the case, *inter alia*, as follows:

- At approximately 2:30 am. on June 30, 2013, in response to an ambiguous 911 call reporting either firecrackers going off or gun-fire into the air from the vicinity of his San Pedro neighbor's backyard (the caller wasn't sure which), multiple LAPD officers quietly positioned themselves along the perimeter of a San Pedro suburban residence and awaited the arrival of a LAPD helicopter. Officer Maynard and others had occupied a position of cover behind the side wall of a house from which vantage point he could see the occupants through a window. Maynard and his fellow officers had seen a disassembled hand-gun inside and knew that the 3 occupants under observation were unaware police were present (a fourth occupant, the homeowner and one of the partier's mother, was sleeping; [a cat belonging to the mother and household was also present];
- Officer Maynard saw Plaintiff begin to walk toward the back sliding glass door of his friend's house, in response to which Maynard told his fellow officer "Someone's coming out";
- Maynard had ample time (at least 30 second to minute) to announce and warn Plaintiff

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1. Plaintiff/Petitioner Ferguson-Cassidy was not on probation or parole or otherwise restricted from possessing a firearm at the time of the incident. Certiorari Petition p. 3, lines 13-14.

by shouting "LAPD: Stop or I'll shoot""freeze" "drop your weapon," (or any variation) and thereafter peaceably detain Plaintiff and fulfill his and his fellow officers' investigative purposes that night arising from the neighbor's ambiguous 911 call;

- Officer Maynard instead broke cover, made a (so-called) "pie" move around the wall, came into confrontation with Plaintiff at a 15 foot distance and immediately ambushed Plaintiff without: any pre-announcement of his presence, demand that Plaintiff submit to detention, or issuing a warning to Plaintiff that he was about to be shot by a police officer.

Because the jury had returned a defense verdict, Plaintiff stipulated for all appellate purposes that at the moment of the shooting Maynard was in fear for his life due to seeing Plaintiff exit the house carrying a hand-gun pointed downwards, which Plaintiff began to raise in the (literally) micro-second interval between the officer's announcement "Don't f–ing move" and the first of the 6 shot volley of M-16 rifle shots. The audio recording of the shooting is here: https://drive.google.com/file/d/0B4bV6b2RHqRHN2ZhYUd5c0F2Zjg/view at 4:49.

Plaintiff asserted on appeal:

- that longstanding use-of-force precepts (dating back to the "Peel principles" from dawn of policing in England) and Supreme Court case law governing deadly force (*Tennessee v. Garner*)as well as 9th Circuit cases require badged officers to warn persons of interest in advance of employing deadly force wherever it is practicable to do so (as here);
- that the jury wasn't informed of this settled applicable law; and
- that because a warning (or its functional equivalent, an announcement of the officer's presence) <u>was</u> legally required and indisputably practicable and was indisputably <u>not</u> given (the microsecond interval between the officer's exclaimed expletive – which was

not in any event a warning – and the first shot affording Plaintiff no time to comply), no (legally consequential) evidence supported the jury's defense verdict and that Plaintiff was therefore entitled either to a directed verdict (under *Scott v. Harris* footnote 8) or at a minimum entitled to a remand for a new trial (preferably before a different trial judge).

During Ninth Circuit oral argument, Plaintiff's counsel bluntly stated that because the jury deliberated while oblivious to applicable law their verdict in this civil rights case "wasn't worth the paper it was written on." Alas, the 9th Circuit's memorandum affirmance is of a piece.

In his certiorari petition Ferguson-Cassidy respectfully urged the honorable Supreme Court to employ the instant case to (**at the very least**):

1) **Per Questions 1 and 1a:** Address the circuit split regarding unreasonable pre-seizure conduct in at least one crucial life-saving respect and rule that non-pre-warned shootings (when warnings were practicable) "automatically" give rise to civil liability even when an officer shoots a suspect while in fear for his life;

2) **Per Questions 2, 2a, and 2b:** Correct a manifest injustice and rule that in the absence of any contention that the officer pulled the trigger of his weapon involuntarily (such as, for example, in the throes of a seizure) District Judges must deem such police shootings (by definition) intentional acts, and must refrain from instructing the jury that in order to impose civil liability on the officer the jury must find that the shooting was an intentional act, as opposed to a "negligent, accidental or inadvertent" act;

3) **Per Questions 3 and 3a:** Answer the question (or alternatively direct the ninth circuit to address the below-framed issues on remand) raised in the asterisked footnote in *Los Angeles County v. Mendez*, and hold that the *Graham v. Connor* "objective

reasonableness" test "tak[es] into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it," and further hold that the *Ferguson-Cassidy* jury should have been specifically instructed to consider whether Officer Maynard's pre-seizure conduct in doing one or more of the following acts (or inactions) alleged by plaintiff to be unreasonable pre-seizure conduct, gave rise to civil liability on the officer's part notwithstanding the fact that the officer fired a rifle (used deadly force) to effect a detention while in fear for his life:

- Considering (*inter alia* in light of Plaintiff's rights under the Second Amendment) the mere presence in- or handling of a firearm in a private residence and its backyard, to be a mortal threat to the officer, his fellow officers or anyone else;
- Remaining silent upon seeing the plaintiff walk towards- and out the sliding glass door in the back of a residence Officer Maynard was observing from a position of cover;
- Breaking Cover and moving to within 15 feet of Plaintiff knowing that Plaintiff may be holding the gun Maynard previously observed (unassembled); and/or
- Not announcing his presence or issuing an audible warning (such as "Police. Freeze or I'll shoot you") before shooting at Plaintiff.

4) **Per Questions 4 and 4a and their introductory disclosures:** Remand the case to a different District Judge with instructions to file Plaintiff's First Proposed FAC. And do the same in light of the following predicate observations:

- Federal Rule of Civil Procedure 15 and *Foman v. Davis,* 371 U.S. 178, 182 (1962) mandate that leave to amend pleadings shall be "freely given";

- Seemingly due to embroilment Judge Wilson grossly abused his discretion and denied Ferguson-Cassidy's First Motion to File an Amended Complaint ("the First Proposed FAC");
- The First Proposed FAC, *inter alia*, would have positioned Plaintiff with a pendent California state claim for negligence (CFC_EOR_578-580). This negligence state claim, in turn, would have furnished Plaintiff with a legal safety net against worst-case-scenarios in a federal legal environment increasingly inhospitable to civil rights claimants.

5) **Per Questions 5 and 5a and their introductory disclosures:** Deem the Board of Police Commissioners' Report ("the BOPC Report) that found after expert investigation the shooting at issue an unreasonable use of force, admissible evidence the jury was entitled to consider. And do the same in light of the following predicate observations:

- As a highly trustworthy public record the BOPC Report is self-authenticating, the subject of its own statutory hearsay exception (Fed. R. Evid. 803(8)), and is clearly admissible evidence the jury was entitled to consider (and give such weight as they saw fit). This is black letter law! *Shorter v. Baca,* 101 F. Supp. 3d 876 (USDC Cent. Dist. Cal. (2015)). Yet the Defendants successfully shielded from the jury's knowledge the self-damning BOPC Report: As noted in the AOB (at pp.50-51) this sight of the City of Los Angeles (where parenthetically the undersigned counsel was born 63 years ago and raised) reprehensibly "talking out of both ends of its civic/institutional mouth" on a matter of this magnitude created a damnable shameful mockery and spectacle, one Plaintiff implores this honorable

court to undo

This was- and is not a lot to ask. However, on 10/1/2018 this honorable Court denied Mr. Ferguson-Cassidy's Petition (Docket No. 17-8937); this rehearing petition follows.

The technical requirements for rehearing are met through:

1) the frankly alarming conjunction of this high Court's denial of the instant certiorari petition, AND its (shocking) grant of certiorari in the 2017 case of *White v. Pauly*, 137 S.Ct. 548 (2017) which effectively ratified a police execution style slaying done without pre-announcement by the shooting officer of his presence or warning, as well as

2) the longstanding quasi-official "rule of four"[2/] which pivotally depends on the presence of a full complement of 9 justices, to maximize a Petitioner's chance of obtaining 4 votes. Plainly, only 8 justices were present when this Court voted on 10/1/2018 on whether to grant Plaintiff's certiorari petition due to the Senate's delayed confirmation proceeding for Justice Kavanaugh. This prejudicially and possibly outcome-determinatively lessened Plaintiff's chances of having his Petition granted and his case heard by the high Court.

I. THE SUPREME COURT'S SHOCKING 2017 RULING IN *WHITE V. PAULY*, 137 S.CT. 548 (2017), (EFFECTIVELY) GRANTING QUALIFIED IMMUNITY TO AN OFFICER FOR AN EXECUTION-LIKE POLICE SHOOTING COMMITTED WITHOUT PRE-ANNOUNCEMENT OF THE SHOOTING OFFICER'S PRESENCE OR ANY ADVANCE WARNING TO THE VICTIM (MR. PAULY) WHO WAS IN HIS RESIDENCE (*!*) THAT HE WAS ABOUT TO BE SHOT TO DEATH, MEANS THAT THIS HIGH COURT'S SOUGHT-AFTER SUBSTANTIVE RULING ON THE *FERGUSON-CASSIDY* EXCESSIVE FORCE LAWSUIT HAS SUDDENLY BECOME (TO THE BEST OF THE

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2. *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 521, 529 (1957) (Frankfurter, J., dissenting); *U.S. v. Generes*, 405 U.S. 93, 115 n.2 (1972) (Douglas, J., dissenting) (discussing history of rule and fact that Congress discussed it at hearings re 1925 Judiciary Act).

UNDERSIGNED COUNSEL'S KNOWLEDGE) THE ONLY MEANS OF ABATING (IN THE NOT-TOO-DISTANT FUTURE) THE SORT OF HEINOUS QUASI-MILITARY POLICE ACTIVITY THIS COURT (EFFECTIVELY) APPROVED IN *WHITE V. PAULY*. THE LATTER TREND OF DESPOTIC POLICE SHOOTINGS "CAN'T BE HAPPENING HERE" (BUT ALAS IS) BECAUSE IT IS PRECISELY THE KIND OF OPPRESSION KING GEORGE HAD ENGAGED IN AND THAT AMERICAN COLONISTS EVENTUALLY CONCLUDED JUSTIFIED THE REVOLUTIONARY WAR AGAINST BRITAIN!

With his very well-taken entirely meritorious appeal of his civil rights lawsuit (which Plaintiff Ferguson-Cassidy well-recognizes is now "far bigger than just himself") hanging by a proverbial thread, this is no time for Petitioner and his counsel to mince words: In what can only be described (fully advisedly) as an ominous trend of police despotism, well-armed badged officers are frequently ruthlessly, unjustly and/or unnecessarily shooting-to-kill their fellow Americans in response to incidents that began as minor disturbances of the peace.

Even more alarmingly, many of these situations are ones in which (as here) police enter onto residential premises surreptiously, fail to announce their presence and then without ANY prior warning they are about to do so: Shoot-to-kill persons of interest inside or just outside those residential premises. This is equivalent if not worse than the heinous quasi-military activity King George had engaged-in that prompted American colonists to seek independence!

Unfathomably, instead of (long-ago) putting its foot down on such reprehensible oppressive acts, America's federal judges (though split), in perceived fealty to an evermore authoritarian-minded Supreme Court majority, have gone to great lengths to insulate badged officers and their governmental employers from civil liability for such uses of deadly force.

Due to perversion that has infected the application of qualified immunity (a federal judge-invented doctrine that has been extra-statutory and of very dubious legitimacy from the time of

its formal articulation in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982))[3/] almost no such cases in the above-described special category (where police respond to residences where persons of interest who have reportedly engaged in minor disturbances of the peace are holding a firearm and shoot them without pre-announcement of their or warning) can now make it to trial. *White v. Pauly* is but one whopper example in which this honorable Court (effectively) so ruled.

There, this honorable court faulted the 10th Circuit for defining "clearly established law" respecting a police officer's duty to warn if practicable in advance of using deadly force (based on *Garner*) at too high a level of generality, cited with approval Judge Moritz's dissent from the 10th Circuit's refusal to re-hear the case *en banc*, and reversed and remanded as follows:

> The Court of Appeals' ruling relied on general statements from this Court's case law that (1) "the reasonableness of an officer's use of force depends, in part, on whether the officer was in danger at the precise moment that he used force" and (2) "if the suspect threatens the officer with a weapon[,] deadly force may be used if necessary to prevent escape, and if[,] where feasible, some warning has been given." Id., at 1083 (citing, *inter alia*, *Tennessee v. Garner,* 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), and *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); emphasis deleted; internal quotation marks and alterations omitted). The court concluded that a reasonable officer in White's position would have known that, since the Paulys could not have shot him unless he moved from his position behind a stone wall, he could not have used deadly force without first warning Samuel Pauly to drop his weapon.
>
> Judge Moritz dissented, contending that the "majority impermissibly second-guesses" Officer White's quick choice to use deadly force. 814 F.3d, at 1084. Judge Moritz explained that the majority also erred by defining the clearly established law at too high a level of generality, in contravention of this Court's precedent.

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3. *See* William Baude, Is Qualified Immunity Unlawful?, 106 Cal. L. Rev. 45, 50 and Judge Willett's spot-on concurrence dubitante in *Zadeh v. Robinson* (5th Cir. 8/31/2018) (Google Scholar).

> The officers petitioned for rehearing en banc, which 6 of the 12 judges on the Court of Appeals voted to grant. In a dissent from denial of rehearing, **Judge Hartz noted that he was "unaware of any clearly established law that suggests ... that an officer ... who faces an occupant pointing a firearm in his direction must refrain from firing his weapon but, rather, must identify himself and shout a warning while pinned down, kneeling behind a rock wall."** 817 F.3d 715, 718 (C.A.10 2016). Judge Hartz expressed his hope that "the Supreme Court can clarify the governing law." Id., at 719.
>
> The officers petitioned for certiorari. The petition is now granted, and the judgment is vacated: Officer White did not violate clearly established law on the record described by the Court of Appeals panel.
> ...
> The panel majority misunderstood the "clearly established" analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment. Instead, the majority relied on *Graham*, *Garner*, and their Court of Appeals progeny, which — as noted above — lay out excessive-force principles at only a general level. Of course, "general statements of the law are not inherently incapable of giving fair and clear warning" to officers, *United States v. Lanier*, 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), but "in the light of pre-existing law the unlawfulness must be apparent," *Anderson v. Creighton*, *supra*, at 640, 107 S.Ct. 3034. For that reason, we have held that *Garner* and *Graham* do not by themselves create clearly established law outside "an obvious case." *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam); *see also Plumhoff v. Rickard*, 572 U.S. ___, ___, 134 S.Ct. 2012, 2023, 188 L.Ed.2d 1056 (2014) (emphasizing that *Garner* and *Graham* "are 'cast at a high level of generality'").
>
> This is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*.

White v. Pauly, 137 S.Ct. 548 (2017). Emphasis added..

A. This Honorable Court's Resolution and Remand of *White v. Pauly* on Qualified Immunity Grounds, Without Issuing a Ruling on the Merits of Whether Under the Facts Therein Officer White Employed Excessive Force by Virtue of His Failure to Warn Pauly Before Shooting Him to Death, Was and Is a DISASTER for Americans in the Special Category at Issue in this Rehearing Petition: Where Police Respond to Residences Where Persons of Interest Who Have Reportedly Engaged in Minor

Disturbances of the Peace Are Holding a Firearm and Shoot Them Without Pre-announcement of Their Presence or Warning.

Officer White's action were nothing short of outrageous, yet despite the national uproar surrounding horrific police shootings, and when the circuit courts are hopelessly conflicted about whether and how fact-finders are to take into consideration "pre-shooting conduct" in civil liability determinations in deadly forces civil rights cases, this honorable did not see fit to drill-down on the facts and applicable law and RULE on the central contention Plaintiff Pauly had meritoriously invoked: That the *Garner* ruling had long long ago put any reasonable officer on notice that a warning was required before shooting a man to death who had pointed but not fired a firearm at the officer WHILE THE OFFICER WAS IN A SNIPER POSITION WHICH PROVIDED HIM INVULNERABLE COVER! Even worse: the tenor of this honorable Court's per curiam ruling suggests (although the ruling does not so hold) that Officer White's action was NOT beyond the pale and violative of victim Pauly's civil right not to be subjected to excessive force. (Ultimately the 10th accorded White QI but found he HAD employed excessive force.)

But rather than RULE (one way or the other) on whether or not *Garner* is indeed a "dead letter", this high Court in *White* AGAIN emphasized – as it has (frankly) ad nauseam – the impropriety of lower courts defining "clearly established" at too high a level of generality, and reversed and remanded. This honorable Court has done this in case-after-case-after-case-after-case-after-case (repetition rather facetiously employed advisedly) to the point where if virtually the EXACT SAME fact pattern has not been previously held to be violative of a Plaintiff's rights, the officer is held harmless for his misdeeds. This (pernicious) QI doctrine has thereby "yugely" narrowed the number of cases in this special categorical "space" at issue in this rehearing

petition (badged officers shooting without announcement or warning) that ever get to trial.[4/]

1. Qualified Immunity's Overall Legitimacy Aside, this High Court's Obsession With Lower Court's QI Methodology and Its Declination to Substantively RULE on the Subject at Issue in the Instant Certiorari Petition Has Fortified and Routinized Police Shooting Rogueries of the Sort Officer Maynard Inflicted Upon Mr. Ferguson-Cassidy and Has Institutionalized Within the Nation a Much-Too-Varied-and-Uncertain Legal Regime for Evaluating Shootings with Respect to Badged Officer Conduct Prior to the Exact Moment Deadly Force is Used.

David French, a conservative (pro-Second and Fourth Amendment) lawyer, pundit and Supreme Court critic, has vigorously criticized the extent to which this high Court has devoted itself to bolstering the vitality of QI as a get-of-out-liability-free card for law enforcement officers. See Mr. French's work in National Review: "End Qualified Immunity" 9/13/2018 & "It's Time to Deal with the Police Threat to the Second Amendment" 7/30/2017. Appendices A & B.

The high Court's blatantly pro-police results-oriented QI obsession has had an insidious intimidating influence on lower court judges adjudicating cases in this special category of police shootings. The instant case is a perfect exemplar of those where judges who have reluctantly

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4. While it is technically true that a QI ruling can "develop the law" and hold a given police shooting unlawful although not one where the unlawfulness was "clearly established" (therefore sparing the officer from liability). *See eg. Latits v. Phillips*, 878 F. 3d 541 (6th Circuit 2017) and *Pauly v. White*, 874 F. 3d 1197 (10th Cir. 2017). Such rulings though are very weak connotatively from a precedential standpoint (even if they are denotatively "good law", at least "strictly speaking"), and (in any event) plaintiffs always take nothing in damages by such Pyrrhic victories. And because such plaintiffs may not even be declared "prevailing parties" and eligible to invoke the fee-shifting statute, 42 USC §1988, attorneys who achieve such Pyrrhic "wins" may find themselves unremunerated for voluminous time devoted to such cases, and therefore less likely to ever take such cases subsequently. The vitality (letter and spirit) of civil rights in our nation are fast diminishing as the ranks of confident bar members able and willing to tale such cases dwindles due to the unholy alliance involved (of judges reflexively protecting officers) and such practical financial imperatives.

allowed cases to go to trial, thereafter do everything in their power to encourage a jury defense jury. See the cert. petition discussion of Judge Wilson's many errors. Eg.: Wilson's 180 degree reversal of his understanding of the pivotal import of the un-warned nature of the shooting.

In some cases (as here) trial judges go so far as to permit defense counsel in civil rights excessive force cases to get to the jury where no true triable issue of fact exists, where undisputed facts entitle the plaintiff to a judgment as a matter of law, and where allowing the case to be decided by a jury can ONLY result in the nullification of applicable law and a gross miscarriage of justice. That was- and is precisely the situation that pertained and pertains herein.

2. The Above-Described Crisis of Institutional (SCOTUS and Badged Officers) and Doctrinal (QI) Legitimacy Can Be Meliorated If this Honorable Court Were to Accept and Thoughtfully RULE on the Issues Framed in Plaintiff Ferguson-Cassidy's Certiorari Petition.

Plaintiff respectfully suggests that the Supreme Court could go a long ways towards mending qualified immunity (and thereby stemming the growing torrent of criticism favoring its abolition) by transferring the relentless focus it has given to proctoring the "levels of generality" at which circuit judges evaluate landmark- and lesser case law/holdings to instead TAKING and DECIDING far more cases raising vexing issues such as the special category excessive force issues raised by the instant case! NO TIME LIKE THE PRESENT!

The ominous penumbra of the *White v. Pauly* per curiam ruling, one of the darkest in Supreme Court history (and the undersigned has seen and opined on some real duesys, such as *Bush v. Gore*) cannot stand. It validates EXTREME (death squad-level) police roguery and brutality and violates the American plaintiffs' right to jury trial. Former JAG lawyer David French asserts that U.S. Army units he counseled and joined on patrols in Iraq were more

disciplined in their use of deadly force than today's police (*!?*) See Mr. French in National Review: "Shouldn't Police at Home Exhibit at Least as Much Discipline as Soldiers at War?" (Appendix C). The instant *Ferguson-Cassidy* Petition (because it arises out of a somewhat similar fact pattern) frames the doctrinal ways and means to undo the patently wrongly decided *White v. Pauly* ruling (at least its rather strong hint that Officer White had NOT employed excessive force) and abate the heedless, destabilizing and profoundly dangerous, despotic and rightist policing state direction the SCOTUS is taking our beloved country. (In sum: This too shall pass.)

II. CONCLUSION.

During Supreme Court oral argument on 12/4/2013 in *United States v. Apel* (Docket No. 12-1038) the late Justice Scalia exchanged views with plaintiff's counsel Erwin Chemerinsky, now Dean of UC Berkeley's law school (and who sponsored the undersigned for admission to this honorable Court's bar). Scalia said to Chemerinsky: "You can raise it [a constitutional issue attendant to the precise issue on which the high court granted certiorari] **but we don't have to listen to it.**" http://www.c-span.org/video/?85081-1/united-states-v-apel-oral-argument @26:45. Similarly, while this high Court doesn't "have to listen to" a certiorari petition itself filed by plaintiff Cash Ferguson-Cassidy, who now aspires to stem the horrifying epidemic of "police wilding" (wanton unjust shootings) by rogue badged officers in America. But this Court most definitely ought to listen. For its inaction would also be "action" insofar as it will leave the legions of Americans who legally possess firearms in- or just outside their or their friends' residences and engage in disturbances of the peace (or no wrongdoing at all) mortally vulnerable to America's badged officers, many of whom have become ruffians mired in a deep-seated culture of oppression of "the criminal element" (which they define to include any American

holding a gun even in his or a friend's residence (!)). Alas these officers have been emboldened to routinely exceed their authority by the near-total immunity from accountability they enjoy for their undisciplined (sometimes insane) trigger-happy ways. And make no mistake: Leaving be the impunity from even civil liability our nation's badged officers have been gifted-with by irresponsible judges will eventually elicit a rebellious reaction (by the oppressively policed) of a type will make the protests since 2013 seem mild by comparison. To vary President Kennedy's adage about the dynamics of intolerably oppressed populations (in general): "Those who make peaceful **judicially-mandated** reform of oppressive policing culture impossible, will make a violent revolt by the affected (disproportionately African-American and Latino) populations inevitable." As an officer of the courts of California, the District of Columbia and the United States, one who has devoted nearly 2 decades of his career to sounding the alarm about the pernicious nature of what the undersigned calls America's Not-Great society and "policing state" that disproportionately oppresses ethnic minorities, Jacobson would be remiss (and overly "politically correct") in not saying aloud what "everybody knows"[5], in the late great Canadian poet and singer-songwriter Leonard Cohen's phrase.

Respectfully submitted,

October 25, 2018 SIGNED:

Eric C. Jacobson, Supreme Court Bar Member.
Attorney for Petitioner Cash Ferguson-Cassidy

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5. *See* http://www.youtube.com/ watch?v=Lin-a2lTelg ["Everybody knows the deal is rotten. Old Black Joe's still pickin' cotton. For your ribbons and bows. And everybody knows."]

CERTIFICATE OF COUNSEL

As the author of this document and counsel for Petitioner herein, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

October 25, 2018 SIGNED:

Eric C. Jacobson, Supreme Court Bar Member.
Attorney for Petitioner Cash Ferguson-Cassidy

CERTIFICATE OF COMPLIANCE

I certify that the attached Petition for Rehearing is 15 pages, excluding the parts of the document that are exempted by Supreme Court Rule 33.2(b), which states that the exclusions specified in subparagraph 33.1(d) of this Rule apply.

I declare under penalty of perjury that the foregoing is true and correct.

October 25, 2018 SIGNED:

Eric C. Jacobson, Supreme Court Bar Member.
Attorney for Petitioner Cash Ferguson-Cassidy

APPENDIX A
(to *Ferguson-Cassidy* Rehearing Petition)

Conservative Pundit David French's Article in National Review:

"End Qualified Immunity" 9/13/2018
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LAW & THE COURTS

End Qualified Immunity

By DAVID FRENCH | September 13, 2018 4:13 PM

The U.S. Supreme Court building in Washington, D.C., December 18, 2017. (Joshua Roberts/Reuters)

Congress passed a law to restrain government actors. The courts should enforce it as written.

I'm going to start with a story that will break your heart. In the early morning hours of July 15, 2012, a young man named Andrew Scott was up late, home with his girlfriend. They were playing video games when they heard a loud pounding on the door. Alarmed, Scott grabbed a pistol and opened the door. He saw a man crouching outside in the darkness. Scott

Almost instantly, the crouching figure fired his own weapon. The encounter was over in two seconds. Scott lay on the ground, dead. The man who fired? He was a police officer. He was at the wrong house. Andrew Scott was a completely innocent man who had done nothing more than exercise his constitutional right to keep and bear arms in defense of his own home.

As for the officer? Well, not only was he at the wrong house, but he had no search warrant even for the correct house, he had not turned on his emergency lights, and he did not identify himself as police when he pounded on the door.

The officer was never prosecuted. The state ruled that the shooting was "justified" — in part because it said the police had no obligation to identify themselves. Then, when Scott's estate sued the officer for money damages, the court threw out the lawsuit. A panel from the Eleventh Circuit Court of Appeals affirmed the dismissal. Then last year the entire court rejected *en banc* review.

A police officer killed a completely innocent man because of the officer's inexcusable mistake. He escaped criminal prosecution. And then he even escaped civil liability — because of a little-known, judge-made legal doctrine called qualified immunity.

Sadly, this was but one injustice caused by this misguided doctrine. It will not be the last. But there's a solution. Judges created qualified immunity, and they can end it. It's past time to impose true accountability on public servants who violate citizens' constitutional rights.

First, some background. Since 1871, federal law has permitted Americans to file lawsuits against public officials who violate their constitutional rights. It's a powerful tool that essentially deputizes members of the public to defend their own liberties. The relevant statutory language seems quite clear:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable* to the party injured in an action at law, suit in equity, or other proper proceeding for redress. [Emphasis added.]

However, after generations of judges have interpreted the statute, the phrase

immunity, courts originally permitted public officials to "cite traditional common-law defenses of good faith and reasonableness to overcome Section 1983 lawsuits."

In 1982, however, the law changed. In a case called *Harlow v. Fitzgerald*, the Supreme Court concocted the modern doctrine of qualified immunity. Designed in part to encourage the "vigorous exercise of official authority," the Court's redesigned doctrine protected public officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

And how does one determine what is a "clearly established" right? After all, the First Amendment seems relatively clearly established. As does the Fourth Amendment. And the Second. And the Sixth.

But no. As the doctrine developed, to prove that a right is clearly established, the plaintiff generally had to find and cite a remarkably similar case, with nearly identical facts, decided by a court of controlling jurisdiction.

So, when Andrew Scott's estate sought compensation for his death, it didn't *just* have to prove that the officer had no warrant, knocked on the wrong door, and gunned down an innocent man in his own home; it *also* had to find another case "with facts similar to the undisputed facts" in Scott's case. Oh, and the comparison had to be "particularized." "High levels of generality" simply won't do.

In a recent concurrence, newly confirmed Fifth Circuit judge Don Willett launched a blistering attack on qualified immunity:

> how palpably unreasonable — as long as they were the first to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question "beyond debate" to "every" reasonable officer. Put differently, it's immaterial that someone acts unconstitutionally if no prior case held such misconduct unlawful.

I'd encourage you to read the entire concurrence (it's not long). And then I'd also encourage you to read an extraordinary amicus brief filed by one of the most ideologically diverse groups ever arrayed on the same side at the Supreme Court. When the Alliance Defending Freedom, the American Civil Liberties Union Foundation, the Second Amendment Foundation, the Reason Foundation, the National Police Accountability Project, and Public Justice (among others) join hands, we're approaching the "dogs and cats, living together" phase of the judicial apocalypse.

Together, they make a simple and profoundly true point:

> Qualified immunity denies justice to victims of unconstitutional misconduct. It imposes cost-prohibitive burdens on civil-rights litigants. And it harms the very public officials it seeks to protect.

I'd add one more thing to the brief and to Judge Willet's opinion — the entire notion of "clearly established law" rests on a series of absurd, fantastical premises. Are we really to believe that a police officer doesn't know he shouldn't pound on the wrong door and blow away the innocent occupant unless a court said so in a case, say, five years before? Do we really believe police officers and university administrators are diligently reading such cases as they are decided anyhow?

Also note how qualified immunity flips the meaning of the statute upside-

authority" but instead to restrain that authority. Judges have defied Congress. They've granted lawless officials countless free passes for unconstitutional behavior.

As Ford notes in his *New Republic* essay, the judicial times may be changing. Justices Clarence Thomas and Sonia Sotomayor have both signaled their displeasure with the doctrine, and in 2017 respected University of Chicago law professor William Baude wrote a comprehensive critique. While I'd encourage the curious to read the entire paper, this conclusion — from the abstract — is on point:

> Members of the Supreme Court have offered three different justifications for imposing this unwritten defense on the text of Section 1983. First, that the doctrine of qualified immunity derives from a common-law "good-faith" defense. Second, that it compensates for an earlier putative mistake in broadening the statute. Third, that it provides "fair warning" to government officials, akin to the rule of lenity.
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> On closer examination, each of these justifications falls apart for a mix of historical, conceptual, and doctrinal reasons. There was no such defense; there was no such mistake; lenity ought not apply. . . . Despite its shoddy foundations, the Supreme Court has been formally and informally reinforcing the doctrine of immunity. In particular, the Court has given qualified immunity a privileged place on its agenda reserved for habeas deference and few other legal doctrines. Rather than doubling down, the Court ought to be beating a retreat.

Among the many powerful points that ADF, the ACLU, and their allies make in their brief is the link between the culture of impunity created by qualified immunity and the loss of public trust in American institutions. In part because of qualified immunity, public officials in this nation often have greater financial incentives to keep sidewalks repaired than they do to

The amicus brief ends with a powerful quote from *Marbury v. Madison*: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury." Indeed, "One of the first duties of government is to afford that protection."

When it passed Section 1983, Congress took a vital step toward fulfilling that duty. The Supreme Court must not frustrate its intent. The time has come to apply the words of the statute, restore its plain meaning, and end qualified immunity.

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APPENDIX B
(to *Ferguson-Cassidy* Rehearing Petition)

Conservative Pundit David French's Article in National Review:

"It's Time to Deal with the Police Threat to the Second Amendment" 7/30/2017
https://www.nationalreview.com/2017/07/police-threaten-second-amendment-raid-wrong-home-shoot-innocent-man/

LAW & THE COURTS

It's Time to Deal with the Police Threat to the Second Amendment

By **DAVID FRENCH** | July 30, 2017 8:00 AM

(John Roman/Dreamstime)

Police raid the wrong home? If the innocent homeowner is lawfully armed, he could end up dead.

It's happened again. Police officers in Southaven, Miss., were trying to serve an arrest warrant for aggravated assault on a man named Samuel Pearman, but instead they showed up at a trailer owned by an auto mechanic named Ismael Lopez. It was nighttime, and according to his wife,

What happened next was tragic. According to the police, Lopez opened his door and a pit bull charged out. One officer opened fire on the dog, the other officer fired on the man allegedly holding a gun in the doorway, pointing it at the men approaching his home. As the *Washington Post* reported on July 26, it was only after the smoke cleared that the officers made their "heart-dropping discovery: They were at the wrong home."

Lopez died that night. Just like Andrew Scott died in his entrance hall, gun in hand, when the police pounded on the wrong door late one night, Scott opened it, saw shadowy figures outside, and started to retreat back into his house. Police opened fire, and he died in seconds.

Angel Mendez was more fortunate. He "only" lost his leg when the police barged into his home without a warrant and without announcing themselves. They saw his BB gun and opened fire, inflicting grievous wounds.

If past precedent holds, it's likely that the officers who killed Ismael Lopez will be treated exactly like the officers in the Scott and Mendez cases. They won't be prosecuted for crimes, and they'll probably even be immune from civil suit, with the court following precedents holding that the officers didn't violate Lopez's "clearly established" constitutional rights when they approached the wrong house. After all, officers have their own rights of self-defense. What, exactly, are they supposed to do when a gun is pointed at their face?

In other words, the law typically allows officers to shoot innocent homeowners who are lawfully exercising their Second Amendment rights and then provides these same innocent victims with *no compensation* for the deaths and injuries that result. This is unacceptable, it's unjust, and it

Think where this leaves homeowners who hear strange sounds or who confront pounding on the door. Should they risk their safety by leaving their gun in the safe while they check to make sure it's not the police? Should they risk their lives by bringing the gun to the door, knowing that the police may not announce themselves and may simply be trying to barge into the wrong home? Doesn't the right to be free from "unreasonable" search and seizure include a right to be free of armed, mistaken, warrantless, home intrusions?

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It's time for the law to accommodate the Second Amendment. It's time for legal doctrine to reflect that when the state intrudes in the wrong home — or lawlessly or recklessly even into the right home — that it absolutely bears the costs of its own mistakes. It's time for law enforcement practice to reflect the reality that tens of millions of law-abiding men and women exercise their fundamental, constitutional rights to protect themselves and their families.

What does this mean, in practice? First, extraordinarily dangerous and kinetic no-knock raids should be used only in the most extreme circumstances. Writers such as Radley Balko have written extensively about the prevalence of the practice (even in routine drug busts), the dangers inherent in dynamic entry, and the sad and terrible circumstances where the police find themselves in a gunfight with terrified homeowners.

Second, prosecutors should closely scrutinize every single instance of mistaken-identity raids. Good-faith mistakes are always possible, but given the stakes involved when police raid homes or pound on doors late at night with their guns drawn, they should exercise a high degree of care and caution

the state.

Third, if and when police do kill or injure innocent homeowners, they should be stripped of qualified immunity — even when the homeowner is armed. There are circumstances where it would improper to file criminal charges against an officer who makes a good-faith mistake and finds himself making an immediate life-or-death situation, but when the mistake is his, then he should face strict liability for all the harm he causes.

As the law now stands, police are not only rarely prosecuted when they violate the Fourth and Second Amendment rights of innocent homeowners by gunning them down in their own home, it's often difficult even to impose *civil* liability. Innocent men and women are left with no recourse, and officers remain immune from judicial accountability for their own, tragic mistakes.

Last year a Minnesota police officer shot a lawfully armed Philando Castile during a traffic stop — despite the fact that Castile was precisely following the officer's commands. The officer's acquittal unquestionably undermined the Second Amendment, but such shootings are mercifully rare. More common are the panicked, confused moments late at night or early in the morning — when a homeowner hears shouts at his door, or someone breaks it down, and all he knows is that armed men are in his house. In those moments, a person's rights of self-defense are at their unquestioned apex. It's the state's responsibility to protect those rights, not snuff out a life and escape all legal consequence.

READ MORE:

Another Federal Court of Appeals Attacks the Second Amendment

The Real Reason Officers Are Rarely Convicted of Shooting Suspects

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APPENDIX C
(to *Ferguson-Cassidy* Rehearing Petition)

Conservative Pundit David French's Article in National Review:

"Shouldn't Police at Home Exhibit at Least as Much Discipline as Soldiers at War?" 4/4/2018
https://www.nationalreview.com/2018/04/stephon-clark-shooting-police-should-show-more-discipline-restraint/

LAW & THE COURTS

Shouldn't Police at Home Exhibit at Least as Much Discipline as Soldiers at War?

By DAVID FRENCH | April 4, 2018 6:30 AM

NYPD officers on 5th Avenue in New York City in 2016. (Lucas Jackson/Reuters)

A response to Jack Dunphy.

On November 22, 2007, I flew into Forward Operating Base Caldwell in eastern Diyala Province, Iraq. I was the squadron judge advocate for the Second Squadron, Third Armored Cavalry Regiment. One of my

the course of that year, I helped make countless life-or-death decisions — decisions that not only placed the lives of my friends and brothers at risk but also determined whether we killed terrorists or killed civilians.

My commander was a wise man, and he knew that a JAG officer whose sole experience consisted of watching video feeds or hearing radio transmissions would render advice based not in the reality of war but in the abstractions on the screen. So I went outside the wire on patrols — not nearly as often as the daily missions of the cavalry scouts and armor officers I served with, but often enough to understand the reality of the danger. I walked the streets of local towns and villages. I experienced tense situations where you didn't know whether to shoot or hold fire. I learned what it was like to see a car approaching and not know whether the occupant was a terrorist about to blow himself up or a civilian oblivious to the presence of American troops.

It was a tough deployment, one that ultimately earned my squadron the

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constant attacks. IEDs claimed lives. Men died to ambushes. Indirect fire was a frequent threat to our combat outposts. Our troopers fought pitched battles in the streets, called in air strikes, fired thousands of artillery rounds, and killed, wounded, and captured dozens of terrorists. By the end of the deployment, they'd reclaimed thousands of square kilometers from al-Qaeda and left it a broken, spent force.

Do you know how many innocent civilians we killed in that entire deployment, which spanned hundreds of engagements with the enemy? Exactly two. One to small-arms fire and one to a wayward artillery shell.

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Over the past three years, as the issue of police shootings has come to periodically dominate American discourse, I've noticed a disturbing pattern. While many controversial police shootings are lawful and justifiable, many others would be surprising to see in a war zone, much less in the streets of America's cities. Some of the names come easily to mind — Philando Castile, Daniel Shaver, Walter Scott, and (most recently) Stephon Clark.

Why is this case? One part of the answer is easy. Cops are human, and since they're human some will be incompetent, some will panic, and some will be racist. But such shootings happen often enough in a nation that is still enjoying a respite from the horrific crime waves of the late 1980s and early

Another answer came from Jack Dunphy, the "nom de cyber" of a retired LAPD officer who often contributes pieces to NR. Dunphy offers a valuable cop's-eye view of police controversies, and his recent response to my piece criticizing police actions in the Clark shooting is worth reading in its entirely. One passage in particular stands out. Responding to my citation of statistics demonstrating that police killings in Sacramento were extraordinarily rare, and this "background risk" should be considered in ambiguous encounters, Dunphy says this:

> Surprisingly, David also asks that officers, before deciding on a course of action in response to a fleeing suspect, perform an instant, on-the-spot risk analysis based on historical data. "What is the background level of risk here?" he asks. "According to the City of Sacramento, it's been almost 20 years since a cop was shot and killed in the line of duty."
>
> Yes, the last Sacramento Police Department officer shot to death was William C. Bean, Jr, who died in 1999. And the last before him was Doyle A. Popovich, who died in 1974. But the fact that a police officer is murdered in the city only once every 20 or 25 years does not lessen the risk of any individual encounter.

The surprise here is mutual. I'm surprised Dunphy would make this argument. *Of course* officers should have situational and tactical awareness of individual risk. *Of course* the infrequency of police killings (as one factor among many) is relevant to "any individual encounter," especially when the encounter is with a suspected trespasser and vandal not known to be a violent felon.

But rather than emphasizing odds, probabilities, and patterns, training sometimes fills cops' minds with ideas like, "The worst can always happen" or,

bad." Good officers, like good soldiers, know that each encounter takes place against the background of a much larger context, with multiple factors influencing the outcome.

First, it's important to understand that the mission must come before personal safety. When you sign up to wear the uniform, you're tacitly acknowledging as much. This doesn't mean you're required to be reckless with your own life, of course: Prudence and self-protection still matter. But they come behind the purpose of the police force itself. If you have any doubt about this fact, ask the Broward County Sheriff's office. The armed deputy at Marjory Stoneman Douglas High School certainly succeeded in protecting himself during Nikolas Cruz's massacre. But he failed to do his job, placing his own safety above the safety of the innocent kids he was sworn to protect, and he rightly had to face the consequences afterward.

Second, it's important to fully understand the mission. When your job is to preserve the safety, security, and — crucially — liberty of a community, each individual encounter is conducted against the backdrop of those broader, over-arching goals. So, a call to pursue a suspected vandal and trespasser (like in the Clark case) presents a multi-faceted challenge: Apprehend the suspect, protect his civil liberties, understand the community you're policing, and protect the liberties and security of those others who live there, as well. Every confrontation is potentially dangerous, sure, but every confrontation is also complicated by the multifaceted balancing act we ask of our cops. One may argue that we ask too much of our cops, but I don't think so; younger soldiers perform the same balancing act in more dangerous circumstances for less pay every day.

Third, the prudent rules of engagement should vary by the nature of the

robber is different from pursuit of a vandal, and both are dramatically different from rolling up on an actual firefight, like the incident that claimed the life of a Sacramento sheriff's deputy in 2017. While each situation can potentially turn deadly, it's a simple fact that some kinds of encounters are more fraught with peril than others, and greater *inherent* peril demands greater latitude for police use of force.

> Articulating reasons for your fear is not the same thing as articulating "reasonable fear."

Fourth, fear must be subject to reason. Public defenses of police shootings tend to revolve around questions of fear. Officers consistently escape conviction, prosecution, and sometimes even discipline altogether because they are able to effectively articulate why they were afraid for their lives the moment they fired the fateful shot. The legal standard to escape conviction, however, is that they must prove not just that they were afraid but also that their fear was "reasonable." Articulating reasons for your fear is not the same thing as articulating "reasonable fear."

Let's take, for example, the statement of Jeronimo Janez, the officer who shot and killed concealed-carry-permit holder Philando Castile at a traffic stop:

> I don't remember how many rounds I let off. Um, I remember seeing the last two rounds go off and I remember seeing one of those rounds hit him in the arm. Uh, his glasses flew off. I'm not sure if it was from gunfire or from him, uh, whipping his head back or anything like that. Uh, but, uh as that was happening, as he was pulling at, out his hand, I thought I was gonna die and I thought if he's, if has the, the guts and the audacity to smoke marijuana in front of a five-year-old girl and risk her lungs and risk her life by giving her secondhand smoke and the front-seat passenger

> [*sic*] was screaming. I held the suspect at gunpoint. His arms came up into view. And they were up by his chest. I can't remember what I said. But I acknowledged this little girl first. 'Cause I wanted her to be safe and I told Officer Kauser or I told her one of the two to go run out of the car and run to Office Kauser or Officer Kauser to get her. And then I turned my attention to the front-seat passenger. I didn't point my firearm at her. I still had it on the suspect. 'Cause he was still moving.

Got that? One of the reasons Janez was afraid was that he thought Castile had disregarded the life of a five-year-old by "giving her secondhand smoke." So naturally, he then decided to *fire his gun into a car containing that very same five-year-old*. In reality, Janez panicked, and while that is understandable, it is not a justification for shooting Castile.

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To return to Iraq, here's a concrete example of how awareness of the overall mission, personal risk, and personal courage can combine to demand restraint even when deadly force is legally authorized.

It was a terrible night in late winter, 2008. An IED had hit one of our Humvees, injuring two soldiers and killing one. While the medevac chopper was inbound, our guys spotted a small group of what looked like men lying in the prone position in a ditch. From that vantage point it appeared they could engage the helicopter before it could land. No weapons were immediately visible.

So the question became: Shoot or don't shoot?

The law of armed conflict said that we could shoot. Men lying prone in a position of tactical advantage when troops are in range can legally be

Fire and you neutralize the possible threat, making sure that the medevac helicopter can complete its mission. But if you hit civilians, though the medevac will still complete its mission, you have endangered the squadron's larger objectives of securing the village and recruiting allies to join friendly militias.

Immediately engaging risked the larger mission too much. Simply ignoring the threat risked the medevac too much. So we chose a middle course. We asked our men to emerge from cover and move to investigate and perhaps detain the suspicious men. With the burning Humvee behind them, our cavalry troops cautiously probed forward and discovered not men but a group of unarmed boys. They'd heard the "boom" of the IED, ran out to investigate, and then took cover when they saw American troops swarming around.

They had no weapons. They had no cameras (al-Qaeda sometimes used kids with cameras to do damage assessments after IED strikes). They were just kids, and had we killed them where they hid, the repercussions could have been immense.

I bring up examples like this not to claim that police officers usually or routinely don't show this level of situational awareness and restraint. They do. Through training, courage, and instinct most officers understand each and every truth I've outlined above. It's one reason why, even though cops routinely engage in tense confrontations, we don't have *more* problematic shootings.

But when the police do fail, and they shoot a man who was, in actuality, no threat at all, it is no answer to criticism to stampede to the minimum legal

> A person can be concerned about officer safety and realize the truth that officer safety isn't the mission.

A person can be concerned about officer safety and realize the truth that officer safety isn't the mission. A person can believe blue lives matter and understand that accepting sometimes extraordinary risk is part of the job. A person can support the police and still demand a very high level of tactical and strategic awareness even from the youngest officers. To put them on the street is to declare to the public that they are up to the job.

The legal bar for successful prosecution of an officer is appropriately high. We should not send a cop to jail if he makes the snap judgment to fire his weapon while *reasonably* fearing death or serious bodily injury. But I'm concerned that juries are too willing to excuse fear in the absence of reason, and I'm concerned that our bar for training, competence, and courage is often too low.

Men in uniform inspire respect not because of the uniform itself but because of what the uniform is supposed to represent. It's supposed to represent not just a commitment to selfless sacrifice but also a commitment to excellence. Countless cops exhibit those very characteristics. Too many others do not. In the face of this reality, the least we can ask is that cops show as much discipline as soldiers at war.

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No. 17-8937

IN THE SUPREME COURT

OF THE UNITED STATES

CASH JEROME FERGUSON-CASSIDY,

PETITIONER

vs.

CITY OF LOS ANGELES; LOS ANGELES POLICE DEPARTMENT; and JACOB MAYNARD, Police Officer II, LAPD Serial No. 34820, in his official capacity and in his individual capacity,

RESPONDENTS

PROOF OF SERVICE

I, ERIC C. JACOBSON, ESQ., do swear or declare that on this date, October 25, 2018, as required by Supreme Court Rule 29, I have served a copy of the enclosed **"BRANDEIS" PETITION FOR REHEARING FOLLOWING DENIAL OF PETITION FOR A WRIT OF CERTIORARI** on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

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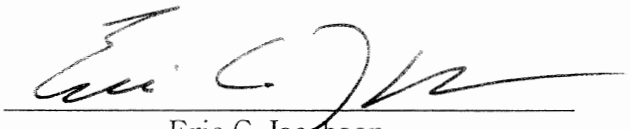
I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 25, 2018.

SIGNED: 

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